Looking ahead to the US FinTech regulatory landscape for 2017

Erin Fonte, Member at Dykema and member of the *Payments & FinTech Lawyer* Editorial Board, and Jacqueline Allen, Associate at Dykema, provide an overview of the US FinTech regulatory landscape for 2017. In doing so they touch upon, *inter alia*, the possible impact of the Trump Administration on the regulation of this sector and the announcement on 2 December 2016 by the U.S. Comptroller of the Currency Thomas J. Curry that the Office of Comptroller of the Currency will issue new special purpose national bank charters for FinTech companies.

As financial services innovators and financial technology ('FinTech') have expanded over the last several years, a point of industry consensus is that the US regulatory landscape in particular is challenging to, and in some cases poses a barrier to, innovation and new competition within the FinTech arena. Critics of the US regulatory regime point to a confusing web of multiple federal functional regulators and state money transmission regulators. The sheer number of potential laws, rules, regulations and regulatory entities that can be involved in regulating a particular FinTech startup based upon the product and services provided are subject to increased scrutiny and criticism from the FinTech industry.

The perception (and arguably also the reality) that companies are extremely daunted by US regulatory requirements and that some companies choose to launch their FinTech products and services outside the US under more 'FinTech-friendly' regulatory regimes has gotten the attention of US federal regulators, particularly the Office of the Comptroller of the Currency ('OCC'), during 2016.

Many US companies point to the more 'FinTech-friendly' regimes in other countries. FinTech companies contrast the UK regime under the Financial Conduct Authority, for example, with the much more confusing, inconsistent and less user-friendly laws, rules and regulations in the US. Recently a US alliance of technology leaders, including Amazon, Apple, Google, Intuit and PayPal (among others) called 'Financial Innovation Now,' stated in a preface to its recent report entitled 'Examining the Extensive Regulation of Financial Technologies' that "These [US] compliance requirements constitute a significant market barrier, particularly for new entrants, and can sometimes serve to protect incumbent providers from new competition[1]."

Activities at the US federal regulator level starting back in 2015, combined with the incoming Trump Administration that is committed to less regulation across the board, means that the US could see extensive FinTech regulatory changes in 2017, at least at the federal level. There are three key areas to monitor during 2017 with regard to FinTech regulation and the business environment.

Potential US Executive and Congressional action

One of the first big opportunities for full-contact politics under the incoming Trump Administration in 2017 is whether Trump takes action to replace current Consumer Financial Protection Bureau ('CFPB') Director Richard Cordray. There is a case currently on appeal addressing whether the President even has the authority to do that under the Dodd-Frank Act, but Trump may take steps to remove Cordray regardless of the final resolution of the pending constitutional questions. Another looming battle is the repeal of Dodd-Frank either in its entirety, or at least in a manner that will severely change how the CFPB operates, including its overall scope of authority and structure.

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Any changes to the CFPB will have a direct impact on FinTech regulation and climate in the US as the CFPB currently has broad authority to regulate and enforce against non-bank entities that offer financial services to consumers.

There will also be a lot of lobbying and activity of both the Executive and Legislative branches. On 30 November 2016, Financial Innovation Now sent a letter to the Trump-Pence Transition Team that asks President-Elect Trump to make good on his campaign promises of job creation by enacting policies that will enable more rapid development and growth of FinTech[2]. Among the 'wishlist' items in the 30 November letter are:

- Appointment of a US Department of the Treasury Undersecretary for Technology who will be responsible for developing a national vision and coordinated strategy to ensure that America is the best country to create companies and grow jobs in developing financial technologies.
- Promote open, interoperable standards for card payment security that get rid of closed and proprietary networks that lock out innovation.
- Streamline money transmission licensing by working on a streamlined federal money transmission licensing system that protects consumers while facilitating access to new payments services across the US.
- Ensure consumer access to financial accounts and data and prevent financial institutions from blocking consumer-granted access to such information.
- Streamline small business access to capital via the internet and work at the federal level to streamline antiquated state lending laws.
- Help consumers and businesses manage money with real-time payments, and ensure the availability of a real-time payments network for all Americans by 2020.
- Leverage mobile technology to increase financial inclusion[3].

The regulatory reform 'wishlist' from Financial Innovation Now echoes the sentiments and desires of many other FinTech companies in the US to pursue regulatory reform to ease the regulatory burden on FinTech and foster innovation. There will undoubtedly be lobbying on these and similar issues at the Executive and Congressional levels, and perhaps at the state level in at least some key states (think California, Florida, Illinois, New York and Texas - the 'Big Five' for state money transmission licensing based on those being the top five states in terms of population ranking).

OCC explores a special purpose national bank charter for FinTech companies

On 31 March 2016, the OCC released a much anticipated whitepaper entitled Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective[4].

During the last half of 2016, the OCC undertook several activities to implement the goals of the OCC Whitepaper. On 13 September 2016, the OCC announced a notice of proposed rulemaking to implement the basic legal framework for receiverships for any national bank that is not insured by the Federal Deposit Insurance Corporation ('FDIC') (uninsured banks) and for which the FDIC is not required to be appointed as receiver, such as an uninsured trust bank. Many industry observers viewed this as the first step toward the OCC establishing a special purpose national bank charter for FinTech companies anxious to be supervised by a single federal regulator rather than a patchwork of states by establishing a program under which the OCC would be the receiver of failing non-FDIC insured OCC-chartered institutions, with the understanding that an eventual special purpose national bank charter for FinTech companies would fall into the 'uninsured' category[5].

In October 2016, the OCC announced the creation within the OCC of the Office of Innovation. According to the OCC's website, 'Responsible Innovation is the use of new or improved financial products, services and processes to meet the evolving needs of consumers, businesses, and communities in a manner that is consistent with sound risk management and is aligned with the bank's overall business strategy[6].'

U.S. Comptroller of the Currency Thomas J. Curry announced on 2 December 2016 at an event at Georgetown Law School in Washington, D.C. that the

OCC will issue new special purpose national bank charters for FinTech companies beginning January 2017 after the closing of a comment period ending 15 January 2017[7]. The new special purpose charter will allow FinTech companies that collect deposits, issue cheques or make loans (among other traditional banking activities) to have a single national standard for their operations which would allow them to act throughout the entire US in exchange for rigorous oversight by the OCC[8].

Comptroller Curry stated at the Georgetown Law event on 2 December that FinTech has become one of the most active areas of finance in recent years, with more than 4,000 companies that identify themselves as FinTech companies now operating in the US and the UK alone, and garnering up to $24 billion in financing worldwide[9]. While many US FinTech firms may look at the special purpose national charter as a way to get out from under a complicated and costly 50 state licensing regime for money transmission, for example, there will still be a host of requirements on the FinTech chartered institutions, such as capital requirements, Bank Secrecy Act and anti-money laundering compliance and federal consumer protection requirements. In addition, even if the federal Community Reinvestment Act does not apply to FinTech-chartered entities, the OCC will still require financial inclusion initiatives. In conjunction with the announcement, the OCC also released a publication entitled 'Exploring Special Purpose National Bank Charters for Fintech Companies[10].'

State regulators who oversee, among other things, state money transmission licensing and enforcement and state small dollar lending laws, are vehemently opposed to the OCC's special purpose FinTech charter. A press release issued on 2 December 2016 from the Conference of State Bank Supervisors[11] detailed the opposition from state regulators to a new OCC FinTech charter, stating:

- State regulators are concerned that the OCC's subjective criteria for awarding charters, and its intent to not include the normal regulatory safeguards placed on national banks - such as deposit insurance - would result in the OCC choosing winners and losers within the FinTech industry as well as the broader banking industry, a sharp departure from the role of a financial regulator.
- The National Bank Act does not give the OCC authority to issue full-service bank charters to institutions that do not engage in deposit taking. To get around this, the OCC is relying on its own regulations - not the National Bank Act - to create a non-depository special purpose charter for FinTech firms. However, there is no historical precedent for such a charter in the national banking system.
- Despite assurances to the contrary, the Conference believes consumers will be at risk. The OCC has a history of preempting state consumer protection laws in ways that damaged consumers. During the early 2000s, many states adopted laws and brought enforcement actions to stop predatory lending. The OCC's response was to preempt the application of state anti-predatory lending laws to national banks and their operating subsidiaries, thereby permitting unsafe and abusive lending practices to flourish in the lead-up to the US financial crisis.

Federal Reserve Board Faster Payments Task Force

Last but not least, the Federal Reserve Board Faster Payments Task Force has been working since April 2015 to make payments faster and more secure within the US. The Task Force (comprised of the main Task Force and a separate Security Task Force) developed criteria to evaluate potential approaches for establishing a faster payment system in the US and is currently reviewing and discussing 19 specific proposals submitted from companies across the payments industry that outline potential approaches for a faster payment system in the US.

A final two-part report will result from the Faster Payments Task Force work effort. The first section, slated for release in January 2017, will describe the Task Force's history and background, including the process undertaken to identify and assess faster payments solutions. In addition, the report will detail gaps in the current payments landscape and identify opportunities for improvements. It will also outline the benefits to the public of a faster payment system and the needs it would serve. The second section of the final report, targeted for release in mid-year 2017, will include a discussion and assessment of the specific proposals. The proposals will offer models of what an end-to-end faster payment system in the US could look like and will show how each proposal measures up against the various effectiveness criteria. This section will also identify strategic issues deemed important to the successful development of faster payments in the US and recommend industry actions required to advance their implementation and adoption[12].

1. 'New Report Examines Regulatory Landscape of Financial Technologies,' Financial Innovation Now (11 July 2016), available at: www.financialinnovationnow.com
2. 'FIN Calls on President-Elect Trump To Promote Innovation in Financial Services, Appoint Senior Financial Technology Leader,' Financial Innovation Now (30 November 2016), available at: www.financialinnovationnow.org/2016/11/fin-trump-transition-letter/
3. Ibid.
4. 'Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective,' Office of Comptroller of the Currency (March 2016), available at: http://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf
5. Lalita Clozel, 'Cheat Sheet: What the OCC's New Plan Means for a Fintech Charter,' American Banker Magazine (16 September 2016), available at: http://www.americanbanker.com/news/law-regulation/cheat-sheet-what-the-occs-new-plan-means-for-a-fintech-charter-1091365-1.html
6. See the Office of Comptroller of the Currency Office of Innovation page, available at: https://www.occ.gov/topics/bank-operations/innovation/index-innovation.html
7. Evan Weinberger, 'Federal Charters Could Ease Burdens For Fintech Upstarts,' Law360 (15 December 2016), available at: www.law360.com/banking/articles
8. Ibid.
9. Ibid.
10. See the Office of Comptroller of the Currency Office of Innovation page, available at: https://www.occ.gov/topics/bank-operations/innovation/index-innovation.html
11. 'Statement by the Conference of State Bank Supervisors on Comptroller's Announcement of New Federal Charters,' (2 December 2016), available at: https://www.csbs.org/news/press-releases/pr2016/Pages/120216.aspx
12. 'Task Force Begins Review of Faster Payments Solutions Proposals (4 October 2016), available at: https://fedpaymentsimprovement.org/news/press-releases/task-forces-begin-review-of-proposals